

April 1995

A Tribute to Justice Thomas B. Miller

Ancil G. Ramey

Supreme Court of Appeals of West Virginia

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Judges Commons](#), and the [Legal Biography Commons](#)

Recommended Citation

Ancil G. Ramey, *A Tribute to Justice Thomas B. Miller*, 97 W. Va. L. Rev. (1995).

Available at: <https://researchrepository.wvu.edu/wvlr/vol97/iss3/4>

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.

WEST VIRGINIA LAW REVIEW

Volume 97

Spring 1995

Number 3

A TRIBUTE TO JUSTICE THOMAS B. MILLER

ANCIL G. RAMEY*

[T]he genius of the court-created common law is its evolutionary ability 'to grow with and adapt to changing conditions of society.'¹

The long and distinguished judicial career of Justice Thomas B. Miller of the Supreme Court of Appeals of West Virginia, which began on January 1, 1977, recently concluded with his retirement on August 30, 1994. During his tenure, Justice Miller was, by far, the most prolific justice on the Supreme Court of Appeals.² Justice

* A.B., 1979, Marshall University; M.B.A., 1983, West Virginia University; J.D., 1983, West Virginia University; Clerk, Supreme Court of Appeals of West Virginia.

1. *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879, 884 n.14 (W. Va. 1979) (quoting *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666, 675 (W. Va. 1979)).

2. During Justice Miller's tenure, the Supreme Court of Appeals issued 3,936 published opinions, including unsigned per curiam opinions. Of this number, in addition to supervising the preparation of hundreds of per curiam opinions, Justice Miller authored a total of 671 published opinions. The only other justice to serve on the Supreme Court of Appeals during Justice Miller's entire judicial career, Justice Richard Neely, was its next most prolific, authoring 520 published opinions. At least a dozen of Justice Miller's opinions have been chosen as lead cases by the editors of the American Law Reports: *Bettinger v. Bettinger*, 400 S.E.2d 561 (W. Va. 1990), in David J. Marchitelli, Annotation, *Divorce and Separation: Award of Interest on Deferred Installment Payments of Marital Asset Distribution*, 10 A.L.R. 5TH 191 (1993); *Stemple v. Dobson*, 400 S.E.2d 561 (W. Va. 1990), in Frank J. Wozniak, Annotation, *Construction and Effect of Provision in Contract for Sale of Realty by Which Purchaser Agrees to Take Property "As Is" or in Its Existing Condition*, 8 A.L.R. 5TH 312 (1992); *Price v. Halstead*, 355 S.E.2d 380 (W. Va. 1987), in Gregory G. Sarno, Annotation, *Passenger's Liability to Vehicular Accident Victim for Harm Caused by Intoxicated Motor Vehicle Driver*, 64 A.L.R. 4TH 272 (1988); *Bryant v. Willison Real Estate Co.*, 350 S.E.2d

Miller's contributions, however, to West Virginia jurisprudence may not be measured solely in statistical terms. He has often said the primary reason he sought election to the Supreme Court of Appeals was his frustration, as an appellate lawyer, with its reluctance to hear cases involving novel questions.³ Without addressing complex legal issues, many of which were the product of rapidly changing social, cultural, political, and economic conditions, Justice Miller firmly believed that West Virginia's jurisprudence was in jeopardy of stagnating, of growing more anachronistic.⁴ Ultimately, Justice Miller was convinced that,

748 (W. Va. 1986), in Randy R. Koenders, Annotation, *Risk of Loss by Casualty Pending Contract for Conveyance of Real Property—Modern Cases*, 85 A.L.R. 4TH 233 (1991); *Whitehair v. Highland Memorial Gardens, Inc.*, 327 S.E.2d 438 (W. Va. 1985), in John D. Hodson, Annotation, *Dead Bodies: Liability for Improper Manner of Reinterment*, 53 A.L.R. 4TH 394 (1987); *LaRue v. LaRue*, 304 S.E.2d 312 (W. Va. 1983), in Lee R. Russ, Annotation, *Divorce: Equitable Distribution Doctrine*, 41 A.L.R. 4TH 481 (1985); *Flannery v. United States*, 297 S.E.2d 433 (W. Va. 1982), in Annotation, *Loss of Enjoyment of Life as a Distinct Element or Factor in Awarding Damages for Bodily Injury*, 34 A.L.R. 4TH 293 (1984); *In re Estate of Tuebert*, 298 S.E.2d 456 (W. Va. 1982), in Jay M. Zitter, Annotation, *Requirement That Holographic Will, or its Material Provisions, be Entirely in Testator's Handwriting as Affected by Appearance of Some Printed or Written Matter Not in Testator's Handwriting*, 37 A.L.R. 4TH 528 (1985); *State ex rel. Walker v. Giardina*, 294 S.E.2d 900 (W. Va. 1982), in Alois Valerian Gross, Annotation, *Contempt Based on Violation of Court Order Where Another Court Has Issued Contrary Order*, 36 A.L.R. 4TH 978 (1985); *State v. Beck*, 286 S.E.2d 234 (W. Va. 1981), in Vitauts M. Gulbis, Annotation, *Modern Status of Rule Regarding Necessity for Corroboration of Victim's Testimony in Prosecution for Sexual Offense*, 31 A.L.R. 4TH 120 (1984); *State ex rel. McMannis v. Mohn*, 254 S.E.2d 805 (W. Va. 1979), in Michelle Migdal Gee, Annotation, *Propriety and Prejudicial Effect of Witness Testifying While in Prison Attire*, 16 A.L.R. 4TH 1356 (1982); *Murredu v. Murredu*, 236 S.E.2d 452 (W. Va. 1977), in Annotation, *Propriety of Decree in Proceeding Between Divorced Parents to Determine Mother's Duty to Pay Support for Children in Custody of Father*, 98 A.L.R. 3D 1146 (1980).

3. West Virginia and New Hampshire are the only two states in which the jurisdiction of the appellate court of last resort is entirely discretionary. Theoretically, the Supreme Court of Appeals of West Virginia could refuse to grant review in any of the cases presented and, accordingly, issue no decisions with any precedential value. Over the decade prior to Justice Miller's arrival, the Supreme Court of Appeals issued 788 published decisions, or about 79 per year. Over the decade after Justice Miller's arrival, the Supreme Court of Appeals issued 2,253 published opinions, or about 225 per year.

4. In this regard, one commentator observed, "Between 1945 and 1975, the court ranked among the least active and least progressive state supreme courts in the nation." Hagan, *Policy Activism in the West Virginia Supreme Court of Appeals, 1930-1985*, 89 W. VA. L. REV. 149, 149 (1986) (citing Canon & Baum, *Patterns of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines*, 75 AM. POL. SCI. REV. 975 (1981);

in an almost Darwinian sense, if the organic body of West Virginia law did not adapt to its changing environment, the inevitable erosion in public confidence could result in its effective extinction.⁵

Fortunately, for Justice Miller, his ascension to the appellate bench coincided with the election of Justice Sam Harshbarger and Justice Darrell V. McGraw, Jr., who in many respects shared his vision of a more active Supreme Court of Appeals.⁶ These three justices, together with Justice Richard Neely, who came to the court in 1973, and Justice Thomas E. McHugh, who came to the court in 1981, were much more willing than their predecessors to hear and decide cases involving novel or controversial issues. Unlike the Supreme Court of the United States, the position of Chief Justice is rotated among the members of the Supreme Court of Appeals of West Virginia on an annual basis. Consequently, convenient labels like the Warren Court, the Burger Court, or the Rehnquist Court cannot be applied to the Supreme Court of Appeals of West Virginia. In many respects, however, it would likely not cause offense to Justice Miller's colleagues, who frequently acknowledged his role as their spiritual and intellectual leader,⁷ to refer

Baum & Cannon, *State Supreme Courts as Activists: New Doctrines in the Law of Torts*, in STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM 83 (1982)).

5. In report of an August, 1994, interview, the author, quoting Justice Miller, described the reputation of the Supreme Court of Appeals immediately prior to his election as follows: "Circuit judges seated throughout the state didn't pay much attention to the weak court. 'Judges would tell you all the time, when you cited law, 'That might be the law of the Supreme Court, but it's not the law here,'" — an utterance that put Miller, scrupulous in matters of law, into deep distress." Martz, *Justice Leaves Legacy of Benchmark Decisions*, CHARLESTON GAZETTE, Aug. 7, 1994, at 1B, col. 5.

6. This transformation of the Supreme Court of Appeals of West Virginia was chronicled by Hagan in *Policy Activism in the West Virginia Supreme Court of Appeals, 1930-1985*, *supra* note 4.

7. In fact, in a rare act for an appellate judge, the late Justice Sam Harshbarger, in his landmark opinion in *Pauley v. Kelly*, 255 S.E.2d 859, 861 n.1 (W. Va. 1979), holding that the "thorough and efficient" clause of W. VA. CONST. art. XII, § 1 mandates the legislature to develop a high quality public education system, stated, "[t]he writer acknowledges the valuable contributions by his Brother, Thomas B. Miller, especially in the discussions about procedure . . . about equal protection . . . and issues for development upon remand. . . ." In addition, Justice Franklin D. Cleckley, considered by many to be West Virginia's finest legal scholar and teacher, who was appointed to succeed Justice Miller, has referred to him as "the greatest justice in the history of West Virginia," Martz, *supra* note 5, at 1B, col. 1, and dedicated the third edition of his HANDBOOK ON EVIDENCE

to the Supreme Court of Appeals of West Virginia during his tenure as the Miller Court.

Justice Miller was tenacious in his approach to judicial decision-making. During his first term, the Supreme Court of Appeals was frequently criticized for its "activism."⁸ Despite whatever obstacles that may have arisen, however, Justice Miller remained firmly resolved to fulfill his obligation to ensure the constant evolution of the law. No matter how heroic one's efforts, perfection of the common law is forever elusive. Its very strength, its ability, in the words of Roscoe Pound, to "combine[] certainty and a power of growth as no other doctrine has been able to do,"⁹ can also be the source of its greatest frustration. One of Justice Miller's finest achievements was his ability to sustain, without regard to the political consequences, the constant struggle to articulate a more precise expression of the law to meet the demands of contemporary society, hoping that his efforts might not only serve the needs of the present, but also provide guidance for the future evolution of the law. It is extremely fitting, therefore, to pause for reflection upon the career of one of the finest jurists in West Virginia's history.

The remainder of this Article will be devoted to a chronological analysis of a few of Justice Miller's most prominent opinions. His dedication to the advancement of the law is obviously reflected in more opinions than may possibly be discussed in this abbreviated format. The decisions in this Article, however, have been selected as representative of Justice Miller's rich legacy, a series of landmark cases that will provide invaluable guidance to courts for years to come.

FOR WEST VIRGINIA LAWYERS (1994) to Justice Miller, stating, "[h]e brought West Virginia's jurisprudence into the twentieth century."

8. For example, one newspaper editorial writer complained:

"West Virginia's activist Supreme Court kept trying to mold state government in its own image in 1983. The court issued decisions making or reinterpreting law across a wide expanse of public issues—social welfare, education, criminal law, women's rights, consumerism, and relations between state government's judicial, legislative and executive branches."

Little, CHARLESTON GAZETTE, Jan. 1, 1984, at 1B, col. 5, *quoted in* Hagan, *supra* note 4, at 149.

9. POUND, THE SPIRIT OF THE COMMON LAW 182 (1921), *quoted in* Morningstar, 253 S.E.2d at 675.

One of Justice Miller's first opinions,¹⁰ *North v. West Virginia Board of Regents*,¹¹ was a dramatic display of his scholarly approach to judicial decision-making. Its analytical framework would be repeated in dozens of subsequent opinions. The narrow issue in *North* was whether the due process rights of a fourth-year medical student had been violated in the course of his expulsion for misrepresentations on his entrance application.¹² After acknowledging that university attendance was traditionally viewed as a matter of privilege, Justice Miller noted that the Supreme Court of the United States, in *Goss v. Lopez*,¹³ had recently recognized that public school students have liberty and property interests which afford certain due process rights. The reasoning in *Goss*, Justice Miller concluded, "applies with equal force to a student at a state-supported university."¹⁴

In determining the nature of the procedural rights to be afforded to North, Justice Miller explored the variety of interests which the United States Supreme Court and the Supreme Court of Appeals of West Virginia had recognized as deserving due process protection.¹⁵ He noted that as early as 1943, in *State ex rel. Rogers v. Board of Education*,¹⁶ the Supreme Court of Appeals had recognized that certain procedural protections should have been afforded to a county school superintendent who was removed from office. After an exhaustive analysis of relevant precedent, Justice Miller concluded in Syllabus Point 2 of *North*:

[T]here are certain fundamental principles in regard to procedural due process embodied in Article III, Section 10 of the West Virginia Constitution, which are; First, the more valuable the right sought to be deprived, the more safeguards will be interposed. Second, due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise. Third, a temporary deprivation of rights may not

10. This opinion was filed on March 29, 1977, less than three months after Justice Miller began his tenure on the Supreme Court of Appeals.

11. 233 S.E.2d 411 (W. Va. 1977).

12. *North*, 233 S.E.2d at 413.

13. 419 U.S. 565 (1975).

14. *North*, 233 S.E.2d at 415.

15. *Id.* at 415-16.

16. 25 S.E.2d 537 (W. Va. 1943).

require as large a measure of procedural due process protection as a permanent deprivation.¹⁷

With respect to the precise nature of the protections to be afforded a university student upon expulsion, Justice Miller held in *Syllabus Point 3 of North* that "a formal written notice of charges; sufficient opportunity to prepare to rebut the charges; opportunity to have retained counsel at any hearings on the charges, to confront his accusers, and to present evidence on his own behalf; an unbiased hearing tribunal; and an adequate record of the proceedings" were required.¹⁸

In addition to its expansion of the availability of procedural due process protections, Justice Miller's opinion in *North* is notable in other respects. As previously noted, the methodology employed became a hallmark of Justice Miller's opinions. Although he carefully scrutinized both federal and state constitutional provisions, Justice Miller ultimately grounded his opinion on the West Virginia Constitution.¹⁹ In addition,

17. *North*, 233 S.E.2d at 413, Syl. Pt. 2.

18. *Id.* at 413, Syl. Pt. 3.

19. See, e.g., *North*, 233 S.E.2d at 413, Syl. Pts. 1-2. Later, in *The New Federalism in West Virginia*, 90 W. VA. L. REV. 51, 59-64 (1987), Justice Miller discussed the existing line of cases in which the Supreme Court of Appeals interpreted the state constitution as affording greater individual rights than under the federal constitution. Justice Miller concluded his review by remarking: "These cases demonstrate a willingness to establish an independent state constitutional basis where the constitutional language suggests an enhanced right. . . . I believe that our state constitutional jurisprudence will continue to grow. This is particularly so in matters of strong state or local interest." *Id.* at 64-65. In this regard, one legal scholar has observed, "[t]he rulings of the West Virginia Supreme Court of Appeals which construe the provisions of the state constitution . . . have special significance not only in the lives of West Virginians but in the development of a national constitutional jurisprudence." Nichol, *Dialectical Federalism: A Tribute to the West Virginia Supreme Court of Appeals*, 90 W. VA. L. REV. 91, 92 (1987). During his judicial career, Justice Miller authored many of the most significant West Virginia opinions involving constitutional issues. See, e.g., *State ex rel. Bd. of Educ. v. Caperton*, 441 S.E.2d 373 (W. Va. 1994) (affirming the governor's refusal to restore budget cuts after end of fiscal year); *State ex rel. Frail v. \$24,900.00*, 453 S.E.2d 307 (W. Va. 1994) (imposing procedural due process protections in contraband forfeiture cases); *State ex rel. Holmes v. Gainer*, 447 S.E.2d 887 (W. Va. 1994) (upholding the constitutionality of a legislative pay raise); *State ex rel. Lawrence v. Polan*, 453 S.E.2d 612 (W. Va. 1994) (invalidating scheme for issuance of revenue bonds); *State ex rel. Robb v. Caperton*, 446 S.E.2d 714 (W. Va. 1994) (sustaining the constitutionality of a procedure for filling judicial vacancies); *Harris v. Adkins*, 432 S.E.2d 549 (W. Va. 1993) (reconciling the right to petition with the law of defamation); *State ex rel.*

despite meticulously analyzing relevant United States Supreme Court precedent, Justice Miller analogized those precedents to previous decisions of the Supreme Court of Appeals.²⁰ Further, Justice Miller combined his legal analysis with a recognition of changing social conditions, noting that the development of the law regarding the procedural due process rights of students was "largely attributed to politically active students, particularly those involved in the civil rights movement, whose activities resulted in the unrest manifested on many college campuses during the 1960's."²¹ Finally, the opinion was carefully crafted, on the one hand, to provide specific guidance to the trial court upon remand,²² but also, on the other hand, to implicitly challenge

Marockie v. Wagoner, 438 S.E.2d 810 (W. Va. 1993) (invalidating scheme to liquidate school building authority bonds with dedicated consumer sales tax); Boley v. Miller, 418 S.E.2d 352 (W. Va. 1992) (upholding statute providing state funding for abortions); State ex rel. Cravotta v. Hechler, 421 S.E.2d 698 (W. Va. 1992) (directing ballot access after party's candidate permitted to withdraw); Lilly v. Duke, 376 S.E.2d 122 (W. Va. 1989) (invalidating property tax forfeiture statute); State ex rel. Hudok v. Henry, 389 S.E.2d 188 (W. Va. 1989) (recognizing qualified reporter's privilege); Committee on Legal Ethics of the West Virginia State Bar v. Douglas, 370 S.E.2d 325 (W. Va. 1988) (finding limited first amendment protection for a lawyer's criticism of judges); State ex rel. Walton v. Casey, 370 S.E.2d 141 (W. Va. 1988) (invalidating bill that did not include object in title); Daily Gazette Co. v. West Virginia Bd. of Medicine, 352 S.E.2d 66 (W. Va. 1986) (opening physician disciplinary proceedings to public); City of Fairmont v. Pitrolo Pontiac-Cadillac Co., 308 S.E.2d 527 (W. Va. 1983) (declaring municipal fire fee to be an unconstitutional ad valorem tax); Hickson v. Kellison, 296 S.E.2d 855 (W. Va. 1982) (declaring jail conditions violative of constitutional standards); Myers v. Barte, 279 S.E.2d 406 (W. Va. 1981) (invalidating freeholder requirement for membership on municipal planning commission); State ex rel. Bd. of Educ. v. Rockefeller, 281 S.E.2d 131 (W. Va. 1981) (invalidating gubernatorial reduction in budget as violative of constitutionally preferential status of public education); Hendershot v. Hendershot, 263 S.E.2d 90 (W. Va. 1980) (delineating procedural due process protections in contempt proceedings); State ex rel. Herald Mail Co. v. Hamilton, 267 S.E.2d 544 (W. Va. 1980) (recognizing right of public access to criminal proceedings); West Virginia Libertarian Party v. Manchin, 270 S.E.2d 634 (W. Va. 1980) (invalidating as unconstitutional various restrictions on ballot access by third-party candidates); Markey v. Wachtel, 264 S.E.2d 437 (W. Va. 1979) (finding no right to jury trial in involuntary commitment proceedings); State ex rel. Bromelow v. Daniel, 258 S.E.2d 119 (W. Va. 1979) (invalidating municipal ordinance restricting ballot access by requiring evidence of bondability); State ex rel. Piccirillo v. City of Follansbee, 233 S.E.2d 419 (W. Va. 1977) (invalidating statutory restrictions on ballot access based upon payment of taxes).

20. *North*, 233 S.E.2d at 415-16.

21. *Id.* at 414.

22. *Id.* at 418-19.

trial courts to interpret prior precedents more creatively in addressing novel questions of law.²³

Another of Justice Miller's early opinions, *Harless v. First National Bank*,²⁴ is also one of his most seminal.²⁵ It involved one of the most entrenched common law principles, the doctrine of at-will employment. The plaintiff alleged that termination of his employment with the defendant was the direct result of his efforts to ensure his employer's compliance with consumer credit and protection laws.²⁶ The bank responded that, under the common law, his employment was

23. In addition to its citation of *Rogers*, the *North* opinion also cited *Anderson v. George*, 233 S.E.2d 407 (W. Va. 1977) (seizure of animals); *Persinger v. Edwin Assoc.*, 230 S.E.2d 460 (W. Va. 1976) (attachment); *Beverlin v. Board of Educ. of Lewis County*, 216 S.E.2d 554 (W. Va. 1975) (dismissal of a teacher); *State ex rel. Payne v. Walden*, 190 S.E.2d 770 (W. Va. 1972) (distress); *State ex rel. Bowen v. Flowers*, 184 S.E.2d 611 (W. Va. 1971) (suspension from pharmaceutical program); *State ex rel. Bronaugh v. Parkersburg*, 136 S.E.2d 783 (W. Va. 1964) (denial of hospital privileges); and *State ex rel. Ellis v. Kelly*, 112 S.E.2d 641 (W. Va. 1960) (revocation of used car dealer license).

24. 246 S.E.2d 270 (W. Va. 1978).

25. The *Harless* opinion, further, is one of Justice Miller's most frequently cited opinions. It has been cited, according to Shephard's, by the United States Courts of Appeal for the Fourth, Fifth, and Ninth Circuits; by United States District Courts in the First, Second, Third, Fourth, Fifth, Sixth, and Eighth Circuits; and by state appellate courts in Alabama, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. In addition to *Harless*, other significant labor and employment law decisions authored by Justice Miller include *Riesbeck Food Mkts., Inc. v. United Food and Commercial Workers, Local Union 23*, 404 S.E.2d 404 (W. Va. 1991) (restricting the issuance of injunctions against picketing on private property where unfair labor practices charge has been filed); *P.G. & H. Coal Co. v. International Union, United Mine Workers of America*, 390 S.E.2d 551 (W. Va. 1990) (overturning order finding union in contempt for acts of its members); *Collins v. Elkay Mining Co.*, 371 S.E.2d 46 (W. Va. 1988) (holding that retaliatory discharge action could be filed prior to exhaustion of administrative remedies); *Greyhound Lines-East v. Geiger*, 366 S.E.2d 135 (W. Va. 1988) (recognizing cause of action for perpetuation of past discrimination in collective bargaining agreements); *Liller v. West Virginia Human Rights Comm'n*, 376 S.E.2d 639 (W. Va. 1988) (allowing subsequent civil rights action after filing civil service grievance); *City of Fairmont v. Retail, Wholesale, and Dep't Store Union*, 283 S.E.2d 589 (W. Va. 1980) (holding peaceful strike by public employees does not give rise to cause of action by employer for damages); and *Hurley v. Allied Chem. Corp.*, 262 S.E.2d 757 (W. Va. 1980) (recognizing cause of action for denial of employment on the basis of past receipt of mental health services).

26. *Harless*, 246 S.E.2d at 272-73.

terminable at the will of either party, with or without cause.²⁷ Rather than an extensive analysis of this accepted common law principle, Justice Miller began by noting the recent erosion of the at-will doctrine. He observed²⁸ that in cases involving firings for jury service,²⁹ exercising a statutory right as a stockholder to inspect corporate books,³⁰ complaining about unsafe products,³¹ filing workers' compensation claims,³² refusing to undergo polygraph testing,³³ refusing to date a supervisor,³⁴ asserting a right to earned commissions,³⁵ refusing to testify falsely before a legislative committee,³⁶ and applying for union membership,³⁷ courts had either applied or recognized the existence of a cause of action for wrongful discharge in the at-will context. Justice Miller further noted that the harshness of the at-will doctrine had been under recent attack by a number of legal commentators.³⁸ Accordingly, Justice Miller succinctly concluded, "the rule giving the employer the absolute right to discharge an at will employee must be tempered by the further principle that where the employer's motivation for the discharge contravenes some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by the discharge."³⁹

In *State ex rel. McLendon v. Morton*,⁴⁰ the potential for arbitrariness in administrative decisions regarding public employment was presented. In *McLendon*, a professor had been denied a hearing following her employer's refusal to grant tenure.⁴¹ The college claimed, as in

27. *Id.* at 273.

28. *Id.* at 273-75.

29. *Nees v. Hocks*, 536 P.2d 512 (Or. 1975).

30. *Campbell v. Ford Indus.*, 546 P.2d 141 (Or. 1976).

31. *Geary v. United States Steel Corp.*, 319 A.2d 174 (Pa. 1974).

32. *Sventko v. Kroger Co.*, 245 N.W.2d 151 (Mich. Ct. App. 1976); *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973).

33. *Larsen v. Motor Supply Co.*, 573 P.2d 907 (Ariz. 1977).

34. *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974).

35. *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977).

36. *Petermann v. International Brotherhood of Teamsters*, 344 P.2d 25 (Cal. 1959).

37. *Glenn v. Clearman's Golden Cock Inn*, 13 Cal. Rptr. 769 (1961).

38. *Harless*, 246 S.E.2d at 275 (citations omitted).

39. *Id.* at 275.

40. 249 S.E.2d 919 (W. Va. 1978).

41. *Id.* at 920.

North, that the professor had no constitutionally protected interest and, therefore, no right to due process.⁴² Following a painstaking recitation of the procedural history of the case, including the full text of the relevant administrative regulations,⁴³ Justice Miller prefaced his review of United States Supreme Court precedent by noting, "while we may utilize the teachings of the United States Supreme Court in its due process cases, we are not constrained by identity so long as we do not diminish our State standard below the federal standard."⁴⁴ He further observed at the conclusion of such review, that a "precise line cannot be drawn around the concepts of property and liberty interest since these terms expand with society's enlightened values."⁴⁵

In deciding whether a constitutionally protected interest was present, Justice Miller noted that substantial regulations had been promulgated governing eligibility, evaluation, and decision on tenure.⁴⁶ He further noted the professor's six years of full-time employment in academic teaching, which met the only objective criterion for tenure consideration.⁴⁷ Finally, he observed that the only subjective factor contained in the academic regulations, teaching competency, was not relied upon in the denial of tenure.⁴⁸ Rather, the letter informing the professor of the denial of tenure offered no reason for such decision.⁴⁹ Based upon these circumstances, Justice Miller concluded that the professor had more than a unilateral expectation of tenure and, accordingly, she was entitled to certain procedural due process protections.⁵⁰

In *Morningstar v. Black & Decker Manufacturing Co.*,⁵¹ the question of whether a manufacturer was liable in tort in West Virginia to a

42. *Id.*

43. *Id.* at 921-22. This is another characteristic of Justice Miller's opinions, his inclusion of the full text of the language being interpreted, carefully taking the reader through the logical analysis applied in the interpretation of such language.

44. *Id.* at 922 (citation omitted).

45. *Morton*, 249 S.E.2d at 923.

46. *Id.* at 924-25.

47. *Id.* at 925.

48. *Id.*

49. *Id.* It is obvious from the tone of the remainder of Justice Miller's opinion that it was this aspect of the case that he found most disturbing.

50. *Morton*, 249 S.E.2d at 925.

51. *Morningstar*, 253 S.E.2d at 666.

person injured by a defective product was presented.⁵² Judge Cardozo's opinion in *MacPherson v. Buick Motor Co.*⁵³ had rejected the common law principle that a cause of action could not be sustained arising from injuries caused by a defective product unless the plaintiff had privity of contract with the manufacturer. Later, in *Greenman v. Yuba Power Products, Inc.*,⁵⁴ the California Supreme Court expressly

52. In addition to *Morningstar* and *Bradley*, Justice Miller authored many of the leading West Virginia opinions in the area of tort law during his tenure. See, e.g., *Wehner v. Weinstein*, 444 S.E.2d 27 (W. Va. 1994) (rejecting consideration of personal consumption in wrongful death cases); *Wilt v. Buracker*, 443 S.E.2d 196 (W. Va. 1993), *cert. denied*, 114 S. Ct. 2137 (1994) (holding loss of enjoyment of life not subject to economic calculation); *Davis v. Celotex Corp.*, 420 S.E.2d 557 (W. Va. 1992) (finding successor liability for punitive damages); *Courtney v. Courtney*, 413 S.E.2d 418 (W. Va. 1991) (recognizing cause of action for emotional distress for son who witnessed mother's assault by father); *Torrence v. Kusminsky*, 408 S.E.2d 684 (W. Va. 1991) (holding that emergency room personnel are agents of hospital regardless of contractual status); *Anderson v. Moulder*, 394 S.E.2d 61 (W. Va. 1990) (recognizing dram shop liability arising from sale to minor); *Board of Educ. of McDowell County v. Zando, Martin & Milstead, Inc.*, 390 S.E.2d 796 (W. Va. 1990) (holding that good faith settlement extinguishes right of contribution among joint tortfeasors); *Bennett v. 3 C Coal Co.*, 379 S.E.2d 388 (W. Va. 1989) (permitting damages for emotional distress caused by disturbance or desecration of relative's grave); *King v. Kayak Mfg. Corp.*, 387 S.E.2d 511 (W. Va. 1989) (establishing doctrine of comparative assumption of risk); *Greyhound Lines-East v. Geiger*, 366 S.E.2d 135 (W. Va. 1988) (recognizing cause of action for perpetuation of past discrimination in collective bargaining agreements); *Pack v. Van Meter*, 354 S.E.2d 581 (W. Va. 1986) (recognizing cause of action for premises liability); *James G. v. Caserta*, 332 S.E.2d 872 (W. Va. 1985) (recognizing cause of action for wrongful pregnancy); *Conley v. Spillers*, 301 S.E.2d 216 (W. Va. 1983) (explaining doctrine of collateral estoppel); *Sitzes v. Anchor Motor Freight, Inc.*, 289 S.E.2d 679 (W. Va. 1982) (applying retroactively abolition of the common law rule of interspousal immunity); *Sydenstricker v. Unipunch Prods., Inc.*, 288 S.E.2d 511 (W. Va. 1982) (recognizing right of manufacturer in product liability case to file third-party complaint against employer under an intentional tort theory); *Bond v. City of Huntington*, 276 S.E.2d 539 (W. Va. 1981) (permitting recovery of punitive damages in wrongful death actions); *Ratlief v. Yokum*, 280 S.E.2d 584 (W. Va. 1981) (abolishing common law doctrine of last clear chance); *S.R. v. City of Fairmont*, 280 S.E.2d 712 (W. Va. 1981) (finding that a Pennsylvania abortion clinic had sufficient contacts with West Virginia to support the exercise of jurisdiction in a malpractice action instituted by a West Virginia resident); *Kanawha Valley Bank v. Friend*, 253 S.E.2d 528 (W. Va. 1979) (holding that presumption of constructive fraud may arise in connection with joint bank accounts with a right of survivorship if parties occupy fiduciary or confidential relationship); *Coffindaffer v. Coffindaffer*, 244 S.E.2d 338 (W. Va. 1978) (abrogating common law defense of interspousal immunity).

53. 111 N.E. 1050 (N.Y. 1916).

54. 377 P.2d 897, 900 (Cal. 1963).

rejected the requirement of the RESTATEMENT (SECOND) TORTS § 402A, that the product be "unreasonably dangerous." Black & Decker argued, however, that before reaching these issues, the effect of W. VA. CONST. art. VIII, § 13, which provides that, "such parts of the common law . . . as are in force on the effective date of this article . . . shall be and continue the law of this State until altered or repealed by the legislature," must be decided.

Justice Miller noted the divergent line of cases in West Virginia regarding the ability of the Supreme Court of Appeals to alter the common law.⁵⁵ Historically, however, the court had failed to consider persuasive authority in other states with similar constitutional provisions. In fact, as Justice Miller noted,⁵⁶ it was erroneously stated in *Seagraves v. Legg*,⁵⁷ that, "[a]pparently [other] states do not have the same constitutional and statutory provisions as West Virginia" Justice Miller's research revealed an abundance of persuasive authority in other states⁵⁸ for the proposition, as he stated in Syllabus Point 2 of *Morningstar*, that "Article VIII, Section 13 of the West Virginia Constitution and W. Va. Code, 2-1-1, were not intended to operate as a bar to this Court's evolution of common law principles, including its historic power to alter or amend the common law."⁵⁹ In addition to his careful review of judicial decisions in other states with similar constitutional and statutory provisions, Justice Miller characteristically supported his conclusions with a thoughtful analysis of the work of prominent legal scholars.⁶⁰

After resolving the issue of whether its adoption would violate the state constitution, the discussion of incorporation of the law of product liability into West Virginia jurisprudence, though scholarly, was fairly straightforward. The most interesting aspect of this discussion, however, was Justice Miller's discovery of a 1902 West Virginia case, *Peters v.*

55. *Morningstar*, 253 S.E.2d at 670.

56. *Id.* at 671.

57. 127 S.E.2d 605, 607 (W. Va. 1962).

58. *Morningstar*, 253 S.E.2d at 671-76.

59. *Id.* at 667.

60. *Id.* at 675 (citing R. POUND, THE SPIRIT OF THE COMMON LAW 182 (1921); Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

Johnson, Jackson & Co.,⁶¹ in which Judge Branson, fourteen years prior to Judge Cardozo's decision in *MacPherson*,⁶² articulated principles that would eventually be accepted as the law of product liability in a case where the plaintiff sought damages for injuries after ingesting a drug he had not purchased.⁶³ Justice Miller derived great pleasure in tracing the historical antecedents of modern legal principles, particularly if those antecedents were articulated in West Virginia cases. He had a deep appreciation and natural affinity for the appellate judge's role in weaving the threads of precedent, sometimes forgotten, into a cloth fitting the needs of contemporary society.

In *Bradley v. Appalachian Power Co.*,⁶⁴ the issue presented, whether the traditional doctrine of contributory negligence should be rejected in favor of the modern concept of comparative negligence, was perfectly suited for Justice Miller. It afforded him yet another opportunity to shape West Virginia's rapidly changing common law. "[T]he doctrine of contributory negligence," Justice Miller emphasized, "was judicially created."⁶⁵ Reiterating a theme from his earlier opinions, Justice Miller stated, "[t]he history of the common law is one of gradual judicial development and adjustment of the case law to fit the changing conditions of society."⁶⁶ He then embarked on a thorough analysis of the work of legal scholars, the activities of state legislatures, and the decisions of four states that had recently abolished the doctrine of contributory negligence in favor of a "pure" comparative negligence concept.⁶⁷ Eventually, Justice Miller rejected the pure com-

61. 41 S.E. 190 (W. Va. 1902).

62. *MacPherson*, 111 N.E. at 1050.

63. Justice Miller further noted, in chronological order, previous decisions of the Supreme Court of Appeals in *Webb v. Brown & Williamson Tobacco Co.*, 2 S.E.2d 898 (W. Va. 1939) (recognizing cause of action against chewing tobacco manufacturer despite no privity of contract); *Parr v. Coca-Cola Bottling Works*, 3 S.E.2d 499 (W. Va. 1939) (applying doctrine of *res ipsa loquitur* to bottling company); *Blevins v. Raleigh Coca-Cola Bottling Works*, 3 S.E.2d 627 (W. Va. 1939) (applying doctrine of *res ipsa loquitur* to bottling company); and *Ferrell v. Royal Crown Bottling Co.*, 109 S.E.2d 489 (W. Va. 1959) (applying doctrine of *res ipsa loquitur* to bottling company), in support of the proposition that principles of product liability, though not specifically incorporated, were an integral part of the law of West Virginia. *Morningstar*, 253 S.E.2d at 678-79.

64. 256 S.E.2d 879 (W. Va. 1979).

65. *Id.* at 881.

66. *Id.* at 884 (citations omitted).

67. *Id.* at 882-83. Under "pure" comparative negligence, a party may recover,

parative negligence approach in favor of the "fifty percent approach"⁶⁸ that had been recently adopted by a number of state legislatures. He expressed the view that, "[w]hile it can be conceded that there is an obvious injustice in the current contributory negligence rule which bars recovery no matter how slight the plaintiff's negligence, nevertheless the pure comparative negligence rule seems equally extreme at the other end of the spectrum."⁶⁹ In addition to providing illustrative examples of the inherent problems of a pure comparative negligence rule, Justice Miller noted, "in the field of tort law we are not willing to abandon the concept that where a party substantially contributes to his own damages, he should not be permitted to recover for any part of them."⁷⁰

Although Justice Miller recognized the need for the evolution of the common law, he further noted in *Bradley* that its development historically has been "gradual," with an emphasis on the "adjustment" of precedent to "fit the changing conditions of society."⁷¹ Characteristically, Justice Miller expended as much effort in *Bradley* on the practical implications of the new rule and providing guidance regarding its implementation as was expended on deciding the more narrow issue. This pragmatic approach to advancing the common law where the effects of change are uncertain is one of the hallmarks of Justice Miller's philosophy of judicial decision-making.

In *Jenkins v. J.C. Penney Casualty Insurance Co.*,⁷² the application of another Justice Miller opinion, *Hurley v. Allied Chemical*

regardless of whether his or her fault exceeded that of other tortfeasors, based solely on the damages awarded, reduced by the percentage of his or her fault. For example, a party ninety-nine percent at fault, suffering one million dollars in damages, would recover ten thousand dollars from the other party, assuming no damages were suffered by the other party, even though that party was only one percent at fault.

68. This approach provides that a plaintiff may recover only so long as his or her negligence does not equal or exceed fifty percent. *Bradley*, 256 S.E.2d at 882-83. Later, in *King v. Kayak Mfg. Corp.*, 387 S.E.2d 511, 514 (1989), Justice Miller began referring to this concept, more precisely, as "comparative contributory negligence."

69. *Bradley*, 256 S.E.2d at 883-84.

70. *Id.* at 885.

71. *Id.* at 884.

72. 280 S.E.2d 252 (W. Va. 1981).

Corp.,⁷³ which established the West Virginia test for determining whether a statute gives rise to a private cause of action, was involved.⁷⁴ In *Jenkins*, the statute at issue prohibited certain unfair insurance claim settlement practices.⁷⁵ The insurer's chief defense was that even if insureds had a private cause of action under the statute, the plaintiff was a third party who claimed property damage as the result of the negligence of the company's insured and, accordingly, was not a member of the class protected by the statute.⁷⁶ Justice Miller noted, however, the broad language of the statute, which included references not only to "insureds," but also to "claimants" and "beneficiaries."⁷⁷ The insurer also argued that the existence of administrative remedies under the statute was inconsistent with a private cause of action.⁷⁸ Justice Miller rejected this argument, stating that, "the administrative remedy provides no direct relief for an injured person, but only provides sanctions against the company or fines in favor of the State."⁷⁹ Finally, Justice Miller concluded that "the legislative policy encouraging prompt settlement of meritorious claims parallels our long-standing judicial policy that encourages compromise and settlement of disputed claims,"⁸⁰ and that a private cause of action under the statute did exist. Both the holding in *Jenkins* and, more importantly, its clear statement of judicial policy favoring the prompt settlement of insurance claims, have significantly influenced West Virginia law.

73. 262 S.E.2d 757 (W. Va. 1980).

74. *Jenkins*, 280 S.E.2d at 254. For other insurance law opinions authored by Justice Miller, see *Christian v. Sizemore*, 383 S.E.2d 810 (W. Va. 1989) (holding that declaratory judgment to determine insurance coverage could be brought in original personal injury action); *Aetna Casualty & Sur. Co. v. Pitrolo*, 342 S.E.2d 156 (W. Va. 1986) (approving attorney fees and costs against insurer for wrongful failure to defend); *Hensley v. Erie Ins. Co.*, 283 S.E.2d 227 (W. Va. 1981) (concluding that public policy does not preclude insurance coverage for punitive damages in appropriate circumstances); *Staley v. Municipal Mut. Ins. Co.*, 282 S.E.2d 56 (W. Va. 1981) (holding that failure of notice to include words "cancelled" or "cancellation" rendered inadequate notice of cancellation of insurance policy).

75. *Jenkins*, 280 S.E.2d at 254.

76. *Id.* at 255.

77. *Id.* at 256.

78. *Id.* at 257.

79. *Id.* (footnote omitted).

80. *Jenkins*, 280 S.E.2d at 258.

Fairness to women in the distribution of marital assets upon divorce was the issue presented in *LaRue v. LaRue*.⁸¹ Although the Supreme Court of Appeals had previously recognized the equitable powers of a divorce court with respect to the fair division of marital property,⁸² it had never integrated its fragmentary rulings into a comprehensive legal theory. As noted by Justice Miller, the *LaRue* marriage was "traditional,"⁸³ with the wife serving the role of mother and homemaker. Her financial contributions to the marriage, accordingly, were minimal.⁸⁴ Therefore, traditional contract or equitable principles, such as fraud or constructive trust, were not easily applied.⁸⁵ Additionally, homemaker services, as Justice Miller noted, were historically regarded as "consideration for the husband's traditional obligation to support his wife,"⁸⁶ and, accordingly, "upon the dissolution of a marriage where she was not at fault, the wife is entitled to alimony."⁸⁷

Repudiating the traditionally narrow approach to the distribution of marital assets, Justice Miller's opinion in *LaRue* established three im-

81. 304 S.E.2d 312 (W. Va. 1983). In addition to *LaRue* and *Whiting*, Justice Miller wrote several other significant domestic relations cases. *See, e.g.*, *Alonzo v. Jacqueline F.*, 445 S.E.2d 189 (W. Va. 1994) (establishing the right of adopted child to continued contact with siblings); *State ex rel. Sullivan v. Watt*, 419 S.E.2d 708 (W. Va. 1992) (outlining procedure for circuit court review of family law master recommendations); *Gangopadhyay v. Gangopadhyay*, 403 S.E.2d 712 (W. Va. 1991) (mandating procedural protections in reviewing fairness of oral property settlement agreement in divorce proceeding); *Butcher v. Butcher*, 357 S.E.2d 226 (W. Va. 1987) (holding military pension benefits subject to equitable distribution).

82. Justice Miller noted in *LaRue*, that in *Patterson v. Patterson*, 277 S.E.2d 709 (W. Va. 1981), a constructive trust theory was used to secure a wife's interest in property to which she had made a material economic contribution; in *Marshall v. Marshall*, 273 S.E.2d 360 (W. Va. 1981), the principle of fiduciary relationship was applied to property transactions between husband and wife; in *Dyer v. Tsapis*, 249 S.E.2d 509 (W. Va. 1978), the contractual nature of marriage was referenced in regard to the modern concept of no-fault divorce; and in *Phillips v. Phillips*, 144 S.E. 875 (W. Va. 1928), the term "equitable division" was used with reference to property acquired during a marriage. *La Rue*, 304 S.E.2d at 318-20.

83. *LaRue*, 304 S.E.2d at 315.

84. *Id.*

85. In fact, the Supreme Court of Appeals had recently stated, "Traditional domestic services . . . never alone give rise to grounds for impressing the property of the husband with a trust." *Patterson*, 277 S.E.2d at 711, Syl. Pt. 3.

86. *LaRue*, 304 S.E.2d at 322.

87. *Id.* at 322.

portant principles. First, *LaRue* expressly incorporated the “doctrine of equitable distribution” into West Virginia jurisprudence, holding that “a spouse, who has made a material economic contribution toward the acquisition of property which is titled in the name of or under the control of the other spouse” has a “claim [to] an equitable interest in such property in a proceeding seeking a divorce.”⁸⁸ Second, *LaRue* rejected the concept of “fault” as having any relevancy in the distribution of marital assets, holding that “because these are economic contributions, the right to claim such equitable relief is not barred because the party seeking them may be found at fault in the divorce action.”⁸⁹ Finally, overruling the recently decided *Patterson*,⁹⁰ the opinion in *LaRue* held that homemaker services should be considered in the equitable distribution of marital assets upon a divorce.⁹¹ Of course, much has changed since *LaRue*, with the codification⁹² and evolution of the fundamental principles it established. It is clearly, however, a watershed decision in the law of divorce in West Virginia.

The issue of free speech rights for government employees was presented in *Orr v. Crowder*.⁹³ The plaintiff, a college librarian, alleged, inter alia, that she had been fired⁹⁴ for criticizing a plan to remodel the library.⁹⁵ In *Pickering v. Board of Education*,⁹⁶ the United States Supreme Court had recognized that public employees have free speech rights that may be violated by adverse personnel decisions based upon the exercise of such rights. College officials, however, argued that the plaintiff had not met her burden under *Mt. Healthy City Board of Education v. Doyle*⁹⁷ to establish by a preponderance of the evidence that her criticism of the remodeling plans was a substan-

88. *Id.* at 320.

89. *Id.* at 320-21.

90. *Patterson v. Patterson*, 277 S.E.2d 709 (W. Va. 1981).

91. *LaRue*, 304 S.E.2d at 322.

92. See W. VA. CODE §§ 48-2-1 to -36 (1994).

93. 315 S.E.2d 593 (W. Va. 1983).

94. In the strictest sense, the plaintiff's employment was not “terminated,” but she was given a “terminal contract” that would eventually result in her loss of employment. *Id.* at 598.

95. *Id.* at 601.

96. 391 U.S. 563 (1969).

97. 429 U.S. 274 (1977).

tial or motivating factor in her termination. Rejecting a narrow application of the *Mt. Healthy* test, Justice Miller noted that prior to her criticism of their remodeling plans, the plaintiff had a good working relationship with her superiors, who had never expressed any dissatisfaction with her job performance.⁹⁸ In fact, the plaintiff had gradually been given more responsibilities in apparent recognition of her competency.⁹⁹ Conversely, after the plaintiff's criticism, she was confronted by an angry supervisor about her comments during a faculty meeting at which the remodeling plans were discussed, and subjected to a verbal attack by another supervisor at a subsequent meeting.¹⁰⁰ Justice Miller noted that several courts had affirmed verdicts in similar cases based upon circumstantial evidence, and held, as a general proposition, that in determining whether there is sufficient evidence to support a jury verdict, a court should:

(1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which may reasonably be drawn from the facts proved.¹⁰¹

98. *Orr*, 315 S.E.2d at 602-03.

99. *Id.*

100. *Id.* at 604.

101. *Id.* at 606. In addition to this clear articulation of the general rule on the sufficiency of evidence to support a verdict in a civil case, another major holding in *Orr* was necessitated in light of Justice Miller's conclusion that the plaintiff's procedural due process rights were not violated in connection with the denial of her application for tenure, another theory of recovery submitted to the jury upon which it presumably could have based its verdict. Relying on authority in other jurisdictions, Justice Miller's opinion established, for the first time in a West Virginia case, that:

[W]here a jury returns a general verdict in a case involving two or more liability issues and its verdict is supported by the evidence on at least one issue, the verdict will not be reversed, unless the defendant has requested and been refused the right to have the jury make special findings as to his liability on each of the issues.

Id. at 608.

In another opinion by Justice Miller, *Israel v. West Virginia Secondary Schools Activities Commission*,¹⁰² the issue of gender discrimination in access to interscholastic athletics was presented. The plaintiff, who had played baseball competitively with boys her age for almost a decade, challenged an administrative regulation which denied her the opportunity to play on her high school baseball team because her high school had a girls' softball team.¹⁰³ Justice Miller acknowledged that, "courts have recognized that it is constitutionally permissible under certain circumstances for public schools to maintain separate sports teams for males and females so long as they are substantially equivalent,"¹⁰⁴ but further observed, "this does not mean that mere superficial equivalency will be found constitutional under equal protection principles."¹⁰⁵ With no precedent to be found, Justice Miller scrutinized the games of baseball and softball, the differences in the size of the ball, the manner of delivery to the plate, the number of players in the field, the dimensions of the infield, the elevation of the mound, the length of the bat, and the pace of the play, and concluded that, for purposes of equal protection analysis, they were not substantially equivalent.¹⁰⁶

Having determined the existence of a equal protection violation in *Israel*, the nature of available remedies remained for decision. The agency responsible for the regulation of interscholastic athletics argued that it was not a "place of public accommodations" under the state human rights statute, and therefore was not subject to its enforcement provisions.¹⁰⁷ Justice Miller noted that the definition of "place of public accommodations" was much broader under the state act than under the federal act;¹⁰⁸ that the state act provided its provisions were to be liberally construed;¹⁰⁹ that a volunteer fire department had previously been determined by the Supreme Court of Appeals to be a "place of

102. 388 S.E.2d 480 (W. Va. 1989).

103. *Id.* at 482.

104. *Id.* at 484.

105. *Id.* at 485.

106. *Id.*

107. *Israel*, 388 S.E.2d at 488.

108. *Id.* at 488 (citing 42 U.S.C. § 2000a).

109. *Id.*

public accommodations;¹¹⁰ and that other courts had found similar enterprises, including a youth baseball organization, to be places of public accommodations.¹¹¹ Justice Miller concluded that interscholastic athletics have a direct impact on the public school system, generating public interest, support, and attendance, sufficient to meet the definition of a "place of public accommodations."¹¹²

In *Jefferson County Board of Education v. Jefferson County Education Association*,¹¹³ striking teachers urged abrogation of the common law prohibition against strikes by public employees, following issuance of an injunction directing a them to return to work. Although this prohibition was firmly established in common law decisions of numerous state and federal courts, the teachers relied on *County Sanitation District No. 2 v. Los Angeles County Employees Association, Local No. 660*,¹¹⁴ where the California Supreme Court had abrogated the common law rule and adopted a qualified right to strike for non-essential public employees.¹¹⁵ Justice Miller, however, rejected the reasoning in *County Sanitation District No. 2* because, unlike California, West Virginia had no statutory scheme granting public employees collective bargaining rights.¹¹⁶ Recognizing the difficulty in implementing a right to strike where no structure existed for collective bargaining or the resolution of labor disputes, Justice Miller believed that abrogation of the common law rule "would create chaos."¹¹⁷ Moreover, Justice Miller found that granting a corresponding right of government to discharge its striking employees, as discussed in *County Sanitation District No. 2*, was not very realistic, in light of the difficulty in finding qualified replacement workers. Finally, Justice Miller noted that even in states that recognized a limited right of public employees to

110. *Id.* at 489 (citing *Shepherdstown Volunteer Fire Dep't v. West Virginia Human Rights Comm'n*, 309 S.E.2d 342 (W. Va. 1983)).

111. *Id.* (citing *National Org. for Women v. Little League Baseball, Inc.*, 318 A.2d 33, *aff'd mem.*, 338 A.2d 198 (N.J. 1974)) (other citations omitted).

112. *Israel*, 388 S.E.2d at 489.

113. 393 S.E.2d 653 (W. Va. 1990).

114. 699 P.2d 835 (Cal.), *cert. denied*, 474 U.S. 995 (1985).

115. *Jefferson County*, 393 S.E.2d at 653.

116. *Id.* at 657.

117. *Id.* at 658.

strike, such right was inextricably intertwined with the existence of a collective bargaining agreement.¹¹⁸

The reasoning in *Jefferson County Board of Education* was not a departure from previous opinions authored by Justice Miller. To the contrary, the decision reaffirmed his consistently pragmatic approach to the gradual evolution of the common law. Justice Miller observed that:

Although in the past we have not hesitated to alter common law rules where we believed that the changing conditions of society required such a result, in each case, those changes involved rules that were relatively simple in their impact and fell within an accustomed band of court-created common law, such as tort law.¹¹⁹

Conversely, the issue presented in *Jefferson County Board of Education*, Justice Miller stated, had historically "been the exclusive subject of legislation not only because of the complexity of the problem, but also because of its direct impact on the public treasury."¹²⁰

In *Whiting v. Whiting*,¹²¹ the principles of equitable distribution, first enunciated in *LaRue*,¹²² and eventually codified by the legislature, were further refined. In addition to carefully tracing the steps for effectuating an equitable distribution of marital assets, the decision addressed the issue of the effect of using separate property, most commonly acquired prior to the marriage, to purchase jointly-titled property after the marriage. In *Whiting*, the husband had a separate interest in property prior to the marriage, but later had title to the property placed in the names of both parties as joint tenants.¹²³ Justice Miller noted that several jurisdictions had held "that the transfer of separately owned property into joint ownership changes the character of the ownership interest in the property so transferred from nonmarital to marital so that the property is subject to equitable distribution."¹²⁴ Moreover, he observed that this rule "is in accord with the partnership concept of

118. *Id.*

119. *Id.* at 659 (footnote omitted).

120. *Jefferson County*, 393 S.E.2d at 659.

121. 396 S.E.2d 413 (W. Va. 1990).

122. *LaRue*, 304 S.E.2d at 302.

123. *Whiting*, 396 S.E.2d at 415.

124. *Id.* at 419 (citations omitted).

marriage which is the basis for equitable distribution."¹²⁵ Accordingly, Justice Miller concluded:

[W]here, during the course of the marriage, one spouse transfers title to his or her separate property into the joint names of both spouses, a presumption that the transferring spouse intended to make a gift of the property to the marital estate is consistent with the principles underlying our equitable distribution statute.¹²⁶

Development of the *Whiting* marital gift presumption was logical and well-reasoned. It enhances predictability, promotes uniformity, facilitates resolution of factual conflict, and encourages settlement, all of which are characteristic of an opinion authored by Justice Miller.

Preserving the integrity of the West Virginia criminal justice system was presented in *In re Investigation of the West Virginia State Police Crime Laboratory*.¹²⁷ The opinion was prepared by Justice

125. *Id.* (footnote omitted).

126. *Id.* at 421.

127. 438 S.E.2d 501 (W. Va. 1993). In addition to this case, Justice Miller authored a number of the most significant West Virginia opinions in the criminal law area in the past two decades. *See, e.g.*, *Frail v. \$24,900.00*, 453 S.E.2d 307 (W. Va. 1994) (imposing procedural due process protections in contraband forfeiture cases); *State v. George W. H.*, 439 S.E.2d 423 (W. Va. 1993) (declaring no double jeopardy violation for convictions of incest and sexual abuse by guardian arising from same acts); *State v. Gill*, 416 S.E.2d 253 (W. Va. 1992) (declaring no double jeopardy violation for convictions of sexual abuse and sexual abuse by guardian arising from same acts); *State v. Collins*, 409 S.E.2d 181 (W. Va. 1990) (ruling that police statement made under oath, but not under penalty of perjury, should have been excluded as substantive evidence); *State v. Fortner*, 387 S.E.2d 812 (W. Va. 1989) (articulating principle of concerted action in criminal prosecutions); *State v. Weaver*, 382 S.E.2d 327 (W. Va. 1989) (determining that large quantities of alcoholic beverages given to small child could constitute "poison or other destructive thing" under criminal statute); *Myers v. Frazier*, 319 S.E.2d 782 (W. Va. 1984) (recognizing discretion of circuit courts in accepting or rejecting plea agreements); *State v. Bonham*, 317 S.E.2d 501 (W. Va. 1984) (declaring unconstitutional the imposition of a greater sentence on appeal from a magistrate court conviction); *State ex rel. Atkinson v. Wilson*, 332 S.E.2d 807 (W. Va. 1984) (holding that murder statute did not authorize prosecution for death of viable unborn child); *State v. Goff*, 289 S.E.2d 473 (W. Va. 1982) (holding that confession inadmissible in the prosecution's case-in-chief due to *Miranda* violation may be admitted for impeachment purposes when defendant testifies); *State v. Persinger*, 286 S.E.2d 261 (W. Va. 1982) (holding that violation of prompt presentment statute might invalidate confession); *State v. Mitter*, 285 S.E.2d 376 (W. Va. 1981) (reversing conviction where expert testified regarding whether defendant's acts were committed for sexual gratification); *State v.*

Miller and filed less than one week after receipt of a report by a special judge appointed by the Supreme Court of Appeals to supervise an investigation into allegations of misconduct by a former state police serologist.¹²⁸ The report, which followed a five-month investigation, contained shocking information regarding a long history of the misrepresentation and fabrication of evidence by the serologist, including overstating the strength of results of scientific testing of forensic evidence, overstating the frequency of genetic matches, misreporting the number of pieces of evidence tested, misreporting inconclusive results as conclusive, altering and misrepresenting laboratory records, failing to report conflicting scientific results, failing to conduct additional testing to explain conflicting results, implying a match with a suspect when testing supported only a match with the victim, and reporting scientifically impossible or improbable results.¹²⁹ In addition to this individual misconduct, the report summarized the findings of two police serologists, selected by the American Society of Crime Laboratory Directors, and appointed by the special judge, that strongly criticized procedural deficiencies in the state police crime laboratory, including

Scotchel, 285 S.E.2d 384 (W. Va. 1981) (holding that matters intrinsic to jury deliberations could not be used to impeach verdict); *Wanstreet v. Bordenkircher*, 276 S.E.2d 205 (W. Va. 1981) (invalidating recidivist sentence based on nonviolent offenses as violative of proportionality principles); *State v. Clawson*, 270 S.E.2d 659 (W. Va. 1980) (reversing conviction where autopsy photographs of decomposed victims were introduced); *State ex. rel. Herald Mail Co. v. Hamilton*, 267 S.E.2d 544 (W. Va. 1980) (recognizing right of public access to criminal proceedings); *State v. Atkins*, 261 S.E.2d 55 (W. Va. 1979) (refusing to abolish right to retain private prosecutor to assist public prosecutor); *State v. Brewster*, 261 S.E.2d 77 (W. Va. 1979) (reversing conviction where defendant was physically restrained during trial without sufficient evidentiary record); *State v. Milam*, 260 S.E.2d 295 (W. Va. 1979) (holding that failure of prosecution to meet its burden of proving sanity barred retrial); *Martin v. Leverette*, 244 S.E.2d 39 (W. Va. 1978) (declaring unconstitutional the failure to award credit for time served in jail on an indeterminate sentence where underlying offense is bailable); *State v. Kirtley*, 252 S.E.2d 374 (W. Va. 1978) (holding that prosecution bears ultimate burden of proving beyond a reasonable doubt that the defendant did not act in self-defense); *State v. Starkey*, 244 S.E.2d 219 (W. Va. 1978) (holding that malice may be inferred from the unjustified use of a firearm); *Rhodes v. Leverette*, 239 S.E.2d 136 (W. Va. 1977) (holding that an indigent criminal defendant's right to petition for appeal includes the right to be provided a transcript of the proceedings); *State v. McAboby*, 236 S.E.2d 431 (W. Va. 1977) (prohibiting, with certain exceptions, the impeachment of criminal defendants with evidence of prior convictions).

128. *Investigation of the West Virginia State Police*, 438 S.E.2d at 502-03.

129. *Id.* at 503.

the absence of written testing procedures, the lack of internal or external auditing procedures, the absence of proficiency testing, the failure to follow generally-accepted scientific testing standards, and inadequate record keeping.¹³⁰

Justice Miller concurred with the conclusion of the special judge that the serologist's "pattern and practice of misconduct completely undermined the validity and reliability of any forensic work he performed or reported, and thus constitutes newly discovered evidence."¹³¹ In addition to rules governing newly discovered evidence, however, Justice Miller further noted that the United States Supreme Court had held that a conviction based on false evidence constitutes a violation of the defendant's right to procedural due process.¹³² Finally, Justice Miller concluded that the appropriate question in any subsequent post-conviction habeas corpus proceeding was the likely impact of the tainted evidence on the guilty verdict, specifically the test for evidentiary error contained in *State v. Adkins*.¹³³

In very strong language, Justice Miller expressed his sense of outrage at the revelations regarding misconduct by the serologist and the shoddy practices at the crime laboratory, stating "[t]he matters brought before this Court . . . are shocking and represent egregious violations of the right of a defendant to a fair trial. They stain our judicial system and mock the ideal of justice under law."¹³⁴ Accordingly, in a comprehensive and decisive manner, Justice Miller directed immediate implementation of the recommendations of the special judge, including distribution of a special post-conviction habeas corpus form to all prisoners who might desire to seek relief due to the involvement

130. *Id.* at 504.

131. *Id.*

132. *Id.* at 504-05 (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972) (prosecution responsible for false testimony of witness even if prosecutor unaware of falsity); *Miller v. Pate*, 386 U.S. 1, 7 (1967) (conviction overturned where stains identified as blood later determined to be paint); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (conviction obtained through the use of false evidence constitutes due process violation)).

133. *Investigation of the West Virginia State Police*, 438 S.E.2d at 506 (citing *State v. Atkins*, 261 S.E.2d 55, Syl. Pt. 2 (W. Va. 1979), *cert. denied*, 445 U.S. 904 (1980)).

134. *Id.* at 508.

of the discredited serologist.¹³⁵ Finally, Justice Miller directed that copies of the investigative file be provided to the appropriate authorities to determine whether criminal charges against the serologist were warranted, stating that “[t]his conduct should not go unpunished.”¹³⁶

Constitutional limitations on public financing were involved in *Winkler v. State School Building Authority*.¹³⁷ Specifically, the question in *Winkler* was whether bonds issued by the state school building authority violated state constitutional provisions imposing debt limitations on state government.¹³⁸ Proponents argued that disclaimers on the bonds which provided the legislature was not legally obligated to appropriate funds to pay debt service avoided exposure of general revenue and, accordingly, the scheme was constitutional.¹³⁹ Their opponents, however, argued that despite these disclaimers, general revenue was implicated, rendering the scheme unconstitutional.¹⁴⁰

In an opinion filed only two days following oral argument, Justice Miller began his analysis by noting that, pursuant to W. VA. CONST. art. XIV, § 2, the school building funding plan could have been submitted to the voters for approval in the form of a constitutional amendment.¹⁴¹ Next, he observed that although occasionally cited in tandem, the two state constitutional provisions at issue, W. VA. CONST. art. X, §§ 4 and 6, serve different purposes, and that only W. VA. CONST. art. X, § 4, which provides, in pertinent part, that, “[n]o debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion or defend the State in time of war . . . ,”¹⁴² was implicated. Justice Miller further engaged in a thorough discussion¹⁴³ of prior decisions involving the creation of state agencies,¹⁴⁴ the payment

135. *Id.* at 507.

136. *Id.* at 508.

137. 434 S.E.2d 420 (W. Va. 1993).

138. *Id.* at 423.

139. *Id.* at 424-25.

140. *Id.* at 424.

141. *Id.* at 426-27.

142. *Winkler*, 434 S.E.2d at 423.

143. *Id.* at 428-29.

144. *State ex rel. Dyer v. Sims*, 58 S.E.2d 766 (W. Va. 1950), *rev'd on other grounds*,

of rent,¹⁴⁵ the creation of a pension system,¹⁴⁶ lease-financing of government buildings,¹⁴⁷ the construction of a power generating facility,¹⁴⁸ the issuance of industrial and commercial revenue bonds,¹⁴⁹ and the issuance of bonds liquidated from a special fund.¹⁵⁰ Synthesizing these cases, Justice Miller concluded that W. VA. CONST. art. X, § 4 was not designed to prohibit the State "from issuing revenue bonds that are payable from contracts that require rental payments of another state agency or require other necessary recurring contractual expenses such as utilities; nor does this constitutional provision preclude the issuance of revenue bonds which are to be redeemed from a special fund."¹⁵¹

In support of the school building funding plan, proponents relied upon language in *State ex rel. West Virginia Resource Recovery-Solid Waste Disposal Authority v. Gill*,¹⁵² that indicated that bonds dependent upon future legislative appropriations might be permissible so long as successive legislatures are not obligated to make such appropriations.¹⁵³ Justice Miller, however, dismissed this argument, noting that the interpretation urged by the proponents was logical only if "divorced from the facts in that case."¹⁵⁴ Moreover, he observed that, if read as narrowly as urged by the proponents, the *Gill* case would render the constitutional limitation "meaningless."¹⁵⁵ Obviously perturbed at what he perceived as an argument possibly not advanced in good faith, Justice Miller stated, "[i]t is difficult for us to understand how the *Gill* case, under its facts, could be construed to authorize a radical change

341 U.S. 22 (1951).

145. *State ex rel. Hall v. Taylor*, 178 S.E.2d 48 (W. Va. 1971).

146. *State ex rel. Bd. of Governors v. Sims*, 55 S.E.2d 505 (W. Va. 1954).

147. *State ex rel. State Bldg. Comm'n v. Moore*, 184 S.E.2d 94 (W. Va. 1971).

148. *State ex rel. West Virginia Resource Recovery-Solid Waste Disposal Auth. v. Gill*, 323 S.E.2d 590 (W. Va. 1984).

149. *State ex rel. Ohio County Comm'n v. Samol*, 275 S.E.2d 2 (W. Va. 1980); *State ex rel. County Court of Marion County v. Demus*, 135 S.E.2d 352 (W. Va. 1964).

150. *State ex rel. Hall v. Taylor*, 178 S.E.2d 48 (W. Va. 1971).

151. *Winkler*, 434 S.E.2d at 430.

152. *Gill*, 323 S.E.2d at 590.

153. *Winkler*, 434 S.E.2d at 430-31.

154. *Id.* at 431.

155. *Id.*

from our earlier bond cases,"¹⁵⁶ and, "[w]hile we may admire the legal sophistry of this argument, it defies our practical judgment."¹⁵⁷

Justice Miller acknowledged that the weight of authority in other jurisdictions appeared to support the position of the proponents. In *Dykes v. Northern Virginia Transportation District Commission*,¹⁵⁸ the Virginia Supreme Court, after initially deciding that disclaimers notwithstanding, the practical effect of a bond scheme was to impose a long term obligation on general revenue, reversed itself on rehearing and held that the scheme did not impose a legally enforceable obligation on the governmental entity.¹⁵⁹ Similarly, Miller noted that in *Steup v. Indiana Housing Finance Authority*,¹⁶⁰ the Indiana Supreme Court upheld a bonding statute that contained language which expressly provided that there was no obligation on the part of the legislature to fund the liquidation of the bonds.¹⁶¹ On the other hand, in *State ex rel. Ohio Funds Management Board v. Walker*,¹⁶² Miller noted that the Supreme Court of Ohio invalidated a plan to issue revenue anticipation notes that contained a disclaimer similarly designed to avoid constitutional debt limitations.¹⁶³ Following his analysis of decisions in other jurisdictions, Justice Miller concluded:

We simply cannot agree with the rationale of the Virginia and Indiana courts as we find it to chimerical. Obviously, where the only source of funds for revenue bonds is general appropriations, it defies logic to say that the Legislature has no obligation to fund such bonds. These courts are willing to ignore the practical reality that will be visited upon a state's credit if there is a default on the bonds. What these courts have done is

156. *Id.* Additionally, in a footnote to this statement, Justice Miller remarked, "If Gill augured such a radical constitutional departure from our revenue bond law, one wonders why the test case was needed three years later in *State ex rel. Department of Employment Security v. Manchin*, 361 S.E.2d 474 (W. Va. 1987). There, we approved revenue bonds that were to be liquidated from a special tax on employers and wage earners." *Winkler*, 434 S.E.2d at 431 n.21.

157. *Winkler*, 434 S.E.2d at 432.

158. 411 S.E.2d 1 (Va. 1991), *cert. denied*, 112 S. Ct. 2275 (1992).

159. *Winkler*, 434 S.E.2d at 432.

160. 402 N.E.2d 1215 (Ind. 1980).

161. *Winkler*, 434 S.E.2d at 433.

162. 561 N.E.2d 927 (Ohio 1990).

163. *Winkler*, 434 S.E.2d at 434-35.

to ignore the plain language and practical effect of the bond legislation.¹⁶⁴

Accordingly, although concluding that the ruling should not be retroactively applied to invalidate bonds previously issued, which Justice Miller acknowledged "would bring considerable financial chaos to the State,"¹⁶⁵ the revenue bonds authorized under the school building authority statute were declared unconstitutional.¹⁶⁶

The life of an appellate judge is, in many ways, a solitary life. Ethical considerations inhibit interaction with lawyers who might appear before the appellate court. The relationship between appellate and trial judges, granting the ability of one to overturn the decisions of the other, can be rather awkward. Justice Miller was, however, well-suited to the work of an appellate judge. Scholarly, intelligent, compassionate, fair-minded, even-tempered, modest, self-deprecating, and industrious are all adjectives that describe him. "The time is out of joint," might rue Hamlet, "O cursed spite, that ever I was born to set it right,"¹⁶⁷ but Justice Miller was always true to his principles, perhaps quietly resigned to his fate to valiantly search for the answer in every case to the question, "[i]s it a fair result?"¹⁶⁸ To his colleagues, Justice Miller was a compass in occasionally dark and stormy seas, never avoiding a difficult decision, never failing to offer guidance, never resorting to harsh rhetoric or personal attack, never losing sight of the reasons he sought judicial office. We can honor him in no greater measure than in manner which he honored us with his wisdom, his perseverance, and his invaluable contribution to the evolution of our law.

164. *Id.* at 433.

165. *Id.* at 436.

166. *Id.*

167. WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 5.

168. Martz, *supra* note 5, at 1B, col. 1 (quoting Justice Miller's expression of his simple approach to judicial decision-making).

A POSTSCRIPT BY THE HONORABLE THOMAS E. MCHUGH,
CHIEF JUSTICE OF THE SUPREME COURT
OF APPEALS OF WEST VIRGINIA

Justice Thomas B. Miller will always be recognized as one of the premier jurists in the history of our State. It was my honor to have been a colleague of his on the Supreme Court of Appeals of West Virginia from January, 1981, through his retirement in August, 1994. During that time, I observed his intellect, humor, integrity, and unwavering devotion to his judicial duties. The tribute prepared by Ancil G. Ramey, Clerk of the Court, is the most complete compilation of the opinions of any justice. It reflects the unsurpassed contributions by Justice Miller to the jurisprudence of West Virginia. Upon the retirement of Justice Oliver Wendell Holmes from the United States Supreme Court, he sent a note to Justice Louis D. Brandeis. The note stated, in part: "The long and intimate association with men who so command my respect and admiration could not but fix my affection as well." Those words reflect my association with Justice Thomas B. Miller.

A POSTSCRIPT BY THE HONORABLE MARGARET L. WORKMAN,
JUSTICE OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

It was my honor and privilege to serve with Justice Thomas B. Miller on the State Supreme Court for almost six years. I did not know him well before I joined the court, but we both shared the rather intensive experience of running for court in the hard-fought 1988 election campaign. The better I came to know him, the more I liked and admired him.

I came on the court after that difficult campaign as the youngest member and the first woman ever elected. I did not know what atmosphere I would encounter. I found an amazing spirit of collegiality and mutual respect among all the members of the court, and tremendous personal encouragement and support from Justice Miller. When I had the opportunity to move the law into a new or innovative direction in my special areas of interest, and when I proposed the initiation of

special administrative projects relating to women and children's interests, it was Justice Miller whose encouragement and support was always there.

Ancil Ramey's Article only highlights the immense contributions Justice Miller has made to the development of the law. He came to the judiciary at a most propitious time for West Virginia. Society was changing dramatically and new issues of law were emerging. He was instrumental in flinging back the curtains to let the sun shine in as the Supreme Court began to accept and resolve more contemporary and unique legal issues.

On a personal note, perhaps the most pleasurable aspect of working with Justice Miller on a day-to-day basis was his wonderful sense of humor. His dry wit and amazing ability to inject humor when it was most sorely needed sustained all who worked with him.

Whatever time I may spend in the judiciary, it will always be Thomas B. Miller who will personify my ideal of what a judge should be. His immense intellect, integrity, creativity, and compassion have created a lasting legacy.